

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2009-473-WS

IN RE:)
)
Application of Tega Cay Water)
Service, Inc. for adjustment of)
rates and charges and modifications to)
certain terms and conditions for the)
provision of water and sewer service.)
_____)

**MOTION IN LIMINE TO PRECLUDE
CERTAIN TESTIMONY OF
GERALD C. HARTMAN**

Pursuant to Public Service Commission of South Carolina (“Commission”) Regulation 103-829.A¹ and other applicable statutes, rules and regulations, Tega Cay Water Service, Inc. (“TCWS” or the “Company”) herein moves for an order precluding the admissibility of certain testimony of Gerald C. Hartman into the record of this matter. In support thereof, TCWS would respectfully show as follows:

I. BACKGROUND

On February 16, 2010, TCWS filed its application in the instant docket seeking an adjustment of its Commission approved rates and charges and modifications to certain terms and conditions for the provision of water and sewer service. By letter dated February 26, 2010, the Commission established testimony pre-filing deadlines for all parties of record. On March 24, 2010, the City Petitioned to Intervene in this matter which was granted by the Commission by

¹ TCWS acknowledges that 26 S.C. Code Ann. Regs. 103-829.A requires that certain motions be reduced to writing and filed with the Commission at least ten days prior to the commencement of the hearing. As the Commission is aware, the hearing in this matter is scheduled to commence on July 13, 2010. TCWS submits that, due to the established schedule for pre-filing of the City of Tega Cay’s surrebuttal in this matter, which occurred seven days prior to the scheduled hearing date, it was impossible for the Company to comply with this filing requirement.

letter of that same date. Subsequently, the Commission revised the deadlines for the prefiling of testimony for witnesses of each party.

Thereafter, the parties engaged in discovery pursuant to Commission Regulation 103-833 and 103-835. Specifically, TCWS and the City each served interrogatories and requests for production on the other party. Both TCWS and the City served answers to these discovery requests and filed copies of the same with the Commission. Pertinent to this motion, direct testimony of the South Carolina Office of Regulatory Staff (“ORS”) and the City of Tega Cay (“City”) was filed on June 8, 2010. TCWS filed rebuttal testimony on June 29, 2010. Surrebuttal testimony for ORS and the City was due to be filed on July 6, 2010 and, in accordance therewith, the City prefled surrebuttal testimony on behalf of its witness Gerald C. Hartman. As part of his surrebuttal testimony, Mr. Hartman purports to adopt certain positions taken by witnesses for ORS in their direct testimonies. Accordingly, Mr. Hartman does not propose to respond to the rebuttal testimony of TCWS in this regard, but to change his direct testimony as it pertains to his proposed accounting adjustments. Further, by this testimony, the City seeks to introduce in the record matter that should have been, but was not, disclosed to TCWS in discovery. For the reasons discussed below, this testimony is not an appropriate use of surrebuttal and therefore should not be allowed.

II. ARGUMENT

1. City Witness Hartman’s testimony is not proper surrebuttal.

“Surrebuttal is appropriate when, in the judge’s discretion, new matter or new facts are injected for the first time in rebuttal[,] especially where the evidence offered in surrebuttal is for

the first time made competent by the evidence introduced by plaintiff in rebuttal.” State v. Watson, 353 S.C. 620, 632, 597 S.E.2d 148, 150 (Ct. App. 2003) (quoting 88 C.J.S. Trial § 197 (2001)). Therefore, the right to offer surrebuttal testimony is the “right to respond to new evidence.” Id. (citing Camlin v. Bi-Lo, Inc., 311 S.C. 197, 200, 428 S.E.2d 6, 8 (Ct. App. 1993)).² Because the purpose of surrebuttal is to provide parties with the opportunity to respond to rebuttal testimony, the scope of surrebuttal testimony is limited to responding to new matter or new evidence raised in rebuttal. See U.S. v. Barnette, 211 F.3d 803, 821 (4th Cir. 2000) (“Surrebuttal evidence is admissible to respond to any new matter brought up on rebuttal.”).

The surrebuttal testimony of Mr. Hartman inappropriately addresses issues which were not raised by TCWS in its rebuttal testimony. Specifically, Mr. Hartman uses his surrebuttal testimony to address and effectively adopt the return on equity and overall rate of return recommended by Dr. Douglas Carlisle in his direct testimony filed on behalf of ORS. See Hartman Surrebuttal Testimony, p. 1, ll. 6-10 (“The purpose of my surrebuttal testimony is to respond ... to certain aspects of the testimony and exhibits pre-filed by the Office of Regulatory Staff”); p. 2, ll. 1-12; p. 5, l. 13 – p. 6, l. 8; Surrebuttal Exhibit GCH-1, Schedule 12, p. 12. As well, Mr. Hartman proposes to “incorporate a number of [ORS witness Stutz’s] audit adjustments” “with which [he] agree[s].” See Hartman Surrebuttal Testimony, p. 1, ll. 11-24. Although submitted under the guise of being provided “for illustrative purposes only,” Mr. Hartman proposes to sponsor exhibits which demonstrate the effect of these adjustments in an

² See also, Green v. Louder, 29 P.3d 638, 644 -645 (Utah 2001) (quoting Randle v. Allen, 862 P.2d 1329, 1338 (Utah 1993)) (defining “surrebuttal evidence as ‘evidence tending to refute, modify, explain, or otherwise minimize or nullify the effect of the opponent's evidence.’”); Holmes v. State, 119 Md.App. 518, 524, 705 A.2d 118, 121 (1998) (quoting Solko v. State Roads Comm’n, 82 Md.App. 137, 149, 570 A.2d 373 (1990)) (stating that “[s]urrebuttal is essentially a rebuttal to a rebuttal.”).

effort to amend his original adjustments set forth in his direct testimony. See Hartman Surrebuttal Testimony, p. 4, l. 21 – p. 6, l. 8; Surrebuttal Exhibit GCH-1, Schedule 12, p. 12.

Mr. Hartman’s testimony in this regard is contrary to the purpose and exceeds the limitations of surrebuttal testimony and should therefore be precluded from being introduced in this proceeding. TCWS did not prefile rebuttal testimony for any of its witnesses which addressed the return on common equity or overall rate of return sponsored by ORS witness Carlisle. In fact, TCWS did not prefile any rebuttal testimony of its cost of capital witness Pauline Ahern. Therefore, Mr. Hartman’s testimony addressing Dr. Carlisle’s recommended overall rate of return is inappropriate for admission into the record of this proceeding. See Holmes, 119 Md.App. at 524-525, 705 A.2d at 121 (“surrebuttal testimony should be permitted when it explains, directly replies to, or contradicts a new matter brought into the case on rebuttal.”). The Commission must exclude or accord such information no weight because the City has attempted to introduce new material which its witness has not previously sponsored and does not respond to material in TCWS’s Rebuttal Testimony. These portions of the City’s surrebuttal amount to a second “bite at the apple” of direct testimony, deprive TCWS the opportunity to respond, and defies this Commission’s directions regarding direct and surrebuttal testimony. To the contrary, the City’s surrebuttal testimony should not advance any new affirmative claims or arguments that reasonably should have been, but were not, included in the party’s previously-filed testimony.

Similarly, Mr. Hartman’s testimony “incorporat[ing]” ORS’s proposed accounting adjustments are inappropriately offered. Mr. Hartman had the opportunity to sponsor any

accounting adjustments he believed were appropriate in direct testimony. Failing to do so, Mr. Hartman now attempts to “bootstrap” his direct testimony by incorporating certain adjustments sponsored by ORS. Compare Order Granting Motion to Strike Testimony, In Re: Joint Petition for Arbitration of New South Communications, Inc., et al, Docket No. 2005-57-C (Public Service Commission Order No. 2005-387) (granting a party the ability to “file surrebuttal testimony and raise any objections that it feels are necessary . . . in light of its newly acquired knowledge.”) with Order on Arbitration, Petition of HTC Commc’n, Inc. for Arbitration of an Interconnection Agreement with VerizonSouthInc., Docket No. 2002-66-C (S.C. Pub. Serv. Comm’n Order 2002-450) (Indicating that, ordinarily, surrebuttal evidence that is responsive to direct rather than rebuttal testimony or contains additional arguments would not be admissible). Again, Mr. Hartman does not incorporate these adjustments in response to any new evidence raised by TCWS in its rebuttal testimony and, therefore, the extent of his testimony in this regard should be inadmissible. See United States v. Durnin, 632 F.2d 1297, 1301 n. 8 (5th Cir.1980) (surrebuttal testimony should go to the essence of the rebuttal testimony.)

2. The City has not produced in discovery documentation upon which Mr. Hartman relies.

As part of its discovery requests, TCWS required the City to provide “copies of any exhibits which [it] intend[s] to offer into evidence in this proceeding and all documents upon which those exhibits are based or from which they are derived.” TCWS Request for Production of Documents No. 1-21 (emphasis supplied). Additionally, TCWS requested “copies of any exhibits which [it] intend[s] to offer into evidence in this proceeding and all documents upon which those exhibits are based or from which they are derived.” TCWS Request for Production

of Documents No. 1-22. Finally, the City was to provide “copies of all documents, notes, memoranda, electronically stored information, calculations, and any other written or recorded material generated by any expert you intend to call as a witness relies or intends to rely in forming his opinion.” TCWS Request for Production of Documents No. 1-23. To date, the City has not provided information responsive to these requests and, therefore, the testimony of its witness in this regard should be stricken.

Mr. Hartman purports to incorporate the adjustments sponsored by ORS witness Stutz; however, the City has not produced any information which would demonstrate the basis for Mr. Hartman’s reliance upon or the basis for those adjustments. Rather, it would appear that Mr. Hartman has not conducted any independent analysis of the books and records of the company, but is relying upon the testimony of ORS of which Mr. Hartman has no independent basis for forming an opinion. To the contrary, Mr. Hartman is attempting to advance an opinion as to proposed financial standing of the Company without having conducted any calculations, analysis, or audit on his own of the Company’s books and records. See Commission Regulation 103-845.C (“A witness may read into the record, as his direct testimony, statements of fact or expressions of his opinion prepared by him”) (emphasis supplied). Although the Company has accepted many of ORS’s proposed adjustments to the Company’s accounting for revenues, expenses and rate base, the analysis conducted by ORS is not “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.” S.C. R.

Evid., Rule 703.³ Similarly, Mr. Hartman has not established any basis that he has experience in accounting or financial evaluations of utilities. While experts may rely on scientific, technical or other specialized knowledge in certain circumstances, see, e.g., S.C. R. Evid. 702, that principle does not *mutatis mutandis* transform a witness from a person with knowledge or skill in one area into a person with knowledge and skill about matters simply by relying on the testimony of another witness. If that were the case, anyone could become qualified as an expert witness just by talking to an expert witness or adopting the testimony of another.⁴ Therefore, Mr. Hartman's testimony incorporating ORS witness Stutz's adjustments should be excluded from the evidence of record in this matter.

Additionally, Mr. Hartman's surrebuttal testimony addresses purportedly excessive infiltration and inflow on TCWS's system; however, Mr. Hartman has not provided in discovery any documentation upon which his opinion in this regard is based. On behalf of the City, Mr. Hartman takes "exception to Mr. Haas's contention that the I&I was overstated in [his]previous study" which was "based upon a study conducted over 10 years ago at a time that the City of Tega Cay was interested in purchasing the system." Hartman Surrebuttal Testimony, p. 3, ll. 13-17. To date, the City has not produced any document pertaining to this issue; to the contrary, it has only attached an excerpt of a draft study that Mr. Hartman indicates was performed by his former company as an exhibit to his Direct testimony, see Hartman Direct Testimony, Exhibit

³ Other than adopting the positions advanced by ORS, Mr. Hartman has not set forth any basis for his opinion as to why these adjustments may be reasonable. Furthermore, Mr. Hartman has not adopted all of ORS's adjustments, and does not explain why certain adjustments are acceptable and others are not. TCWS submits that this failure to explain the foundation of the adjustments demonstrates that Mr. Hartman has not demonstrated a reasonable basis upon which his testimony in this regard may be offered.

⁴ Mr. Hartman's testimony may also be properly excluded as consisting of cumulative testimony. See Commission Regulation 103-845.B.

GCH-5. Not only did the City not produce the excerpt of this draft study, it has failed to produce the entire document as requested by TCWS. See TCWS Request for Production of Documents No. 1-21. Therefore, Mr. Hartman's testimony in this regard should be similarly precluded from admission in the record of this proceeding.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, Tega Cay Water Service, Inc. respectfully requests that the Commission issue an order precluding the following portions of the Direct and Surrebuttal testimony of Gerald C. Hartman, witness for the City of Tega Cay, from entry into the record of this proceeding:

Hartman Direct Testimony

p. 3, l. 19 - 4, l. 1;

p. 7, ll. 1-22;

p.8, 8, ll. 8-10;

p. 11, ll. 12-16;

Exhibit GCH-2;

Exhibit GCH-5.

Hartman Surrebuttal Testimony

p. 1, l. 11 – p. 2, l. 12;

p. 3, l. 10 – p. 4, l. 13;

p. 4, l. 19;

p. 4, l. 22 – 6, ll. 8.

Surrebuttal Exhibit GCH-1, p.

TCWS further respectfully requests that the Commission grant such other and further relief as is just and proper.

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This 9th day of July, 2010.
Columbia, South Carolina